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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROBYN S. OSINOFF, Plaintiff and Appellant, v. WILLIAM GLUCKSMAN et al., Defendants and Respondents.	B207265 (Los Angeles County Super. Ct. No. BC 363000)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald Sohigian, Judge. Affirmed.

Lipton & Margolin, Hugh Lipton; Loo Alan Goldberg and Alan M. Goldberg for Plaintiff and Appellant.

Robie & Matthai, Edith R. Matthai, Gabrielle M. Jackson and Natalie A. Kouyoumdjian for Defendants and Respondents William Glucksman and Kolodny & Anteau.

Garrett & Tully, Efren A. Compean, Trang T. Tran and John L. Lin for Defendants and Respondents Taylor and Lieberman, Edward Lieberman and Joseph Sweeney.

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Robyn and Leslie Osinoff, married in 1981, were divorced in 2005. After the judgment was entered dissolving the marriage, appellant Robyn[1] sued her attorneys and the accountants who had worked for her in the dissolution proceedings for malpractice. Respondents William Glucksman and the firm Kolodny & Anteau, the lawyers, filed a motion for summary judgment and the accountants, respondents Edward Lieberman, Joseph Sweeney and their firm Taylor and Lieberman, also moved for summary judgment. Both motions were granted. We affirm.

FACTS

Robyn and Leslie were married in 1981. Shortly after the marriage, Robyn became a shareholder in Osinoff General Contractors, Inc. (OGC). Although Robyn worked for OGC as its "financial manager," she has no training in accounting or finance.

During Robyn's tenure as OGC's financial manager, payments were made by OGC into a joint checking account maintained by Leslie and Robyn. A portion of these deposits was not reported as income on state and federal tax returns filed by Leslie and Robyn. Robyn admits that they paid no taxes on a portion of their earnings and states in her declaration that this was "something we [Leslie and Robyn] did together." The transfers into this joint checking account, and presumably failing to report some part of it as income, went on for between 15 to 20 years. It is not disputed that between January 2001 and December 2004 the couple failed to report $188,544 in income.

As might be expected, the fact that the couple failed to report some part of their income to the taxing authorities posed a problem in the dissolution of their marriage.[2] The handling of this problem is one of the contested issues in this case. Respondent Lieberman states in his declaration that he and respondent Glucksman advised Robyn to amend her returns to reflect the unreported income but that she refused to do so and

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[1] As is customary, we will use the parties' first names for the sake of brevity and intend no disrespect thereby.

[2] As we relate below, the dissolution proceedings were commenced in January 2004.

instructed respondents not to disclose the unreported income to the dissolution court. Robyn states that none of the respondents ever advised her "to obtain tax consult or to otherwise address the issues of the unreported income of OGC with tax authorities." We return to this subject when we relate the history of the dissolution proceedings.

Toward the end of 2003, Leslie told Robyn that he wanted a divorce. Robyn filed for divorce in January 2004.

Robyn's mother died in April 2004 and Robyn began receiving income from two trusts established by her parents. It is not disputed that in 2004 she received $26,790 and in 2005, the sum of $34,434; and that her average income from both trusts is $3,650 per month. In June 2004, Robyn began to be treated for depression. (The condition of Robyn's health was to become a factor in the dissolution court's final decision.)

Robyn retained the respondent law firm of Kolodny & Anteau in November 2004. According to Robyn, she told respondent Glucksman of Kolodny & Anteau about the fact that she and Leslie had failed to report a portion of their income to tax authorities. As we have already related, Robyn categorically states that none of the respondents, including Glucksman who was to represent her throughout, ever told her to amend her returns nor did any of the respondents advise her "how to go about protecting myself. . . . Glucksman left me with the tax issue, and left this part of our divorce case unresolved."

According to Robyn, soon after retaining Kolodny & Anteau, Robyn told Glucksman that she wanted to keep the family house on Strawberry Drive. She told Glucksman that to maintain the house required approximately $10,000 per month.

Respondent Glucksman retained respondent accountancy firm of Taylor and Lieberman in November 2004. Taylor and Lieberman were to value Leslie's interest in OGC and to determine the cash flow available for spousal support for Robyn.

The cash flow determination moved the problem of unreported income to center stage. We quote from respondent Lieberman's declaration: "In order to keep the information concerning the unreported income from being disclosed in open court, the unreported income was included in [respondent] Taylor's gross cash flow calculations as an 'agreed upon adjustment.'" Respondent Glucksman's rendition of this is as follows:

"As the unreported cash income would increase the amount of money available to [Leslie] to pay spousal support, I agreed with Mr. Moore's [Leslie's counsel] proposal of a stipulation regarding the average monthly cash flow available to [Leslie] from the business (which included the unreported income)." Robyn has a different view of the matter: "Instead of protecting me, and advising me to amend the tax returns, [Glucksman] made a deal with [Leslie's] attorney, Brian Moore, to hide that income."

The record contains the copy of an email message from respondent Glucksman to the accountants, including Lieberman, at the Taylor and Lieberman firm. The message is dated April 19, 2005, and reviews the status of settlement negotiations. In pertinent part, the message states that Glucksman expected spousal support to be around $9,500 per month. The message goes on to state that Leslie's side offered as spousal support "$5,000 per month for 12 months, then a step down to $3,000 per month. I [Glucksman] rejected that out of hand." Robyn claims that she was never told of this settlement offer and she only learned about it when the email came to light during discovery conducted in the instant malpractice case.

Other than the matter of cash available for spousal support, the parties resolved their differences by a stipulation filed on May 11, 2005. In pertinent part, the stipulation awarded the Strawberry Drive house, valued at $1.7 million with a mortgage of $318,000, to Robyn and OGC to Leslie. The other dispositions of the stipulation, while extensive, are of no moment to this appeal.

On June 16, 2005, the parties entered into a stipulation, which acknowledged that Robyn's accountant expert calculated that the monthly cash flow available to Leslie from OGC for the three-year period ending on January 31, 2004 was $31,843; that Robyn's accountant concluded the income for the same period was $30,685; and that, given these figures, the parties stipulated that the flow of income for the indicated period was $31,264 per month.

The same stipulation went on to expressly reserve for the court's decision the issue whether the court should rely on the "historical cash flow," meaning the stipulated

$31,264 per month, or whether the court should base its decision on Leslie's "actual earnings and cash flow between February 1, 2004 and the present."

Sometime in June 2005, Robyn received from Taylor and Lieberman's office some papers that included a "DissoMaster" calculation of spousal support that was predicated on an income, by Leslie, of $31,264 per month, which was the "historical cash flow" to which the parties had stipulated. This DissoMaster showed spousal support of $9,106 per month.

On the day of the dissolution trial (see text, *post*), respondent Glucksman told Robyn that Leslie's counsel had offered support of $4,700 for two years and $3,000 after that. Robyn asked Glucksman how good the data was that had been prepared by respondent accountants, including the projected spousal support. Glucksman told her that the data was excellent and would be accepted by the court because respondent accountants were well respected. Based on Glucksman's representations, Robyn rejected the settlement offer.

The dissolution action was tried in August 2005. Both Robyn and Leslie testified, as did respondent Sweeney, one of Robyn's accountants. Robyn testified that Leslie was no longer working as hard or as well as prior to their separation and her attorneys argued that Leslie was deliberately diminishing OGC's earnings. On the other hand, Leslie testified that he worked as hard after the separation as before but that the completion of a single, very big project caused a drop in earnings.

The court found that Robyn was not able to work and that it was unclear when, if at all, she would return to the work force. The court also found that Leslie was to some extent disabled due to a medical problem that arose in 1996. The court concluded that neither party "is going to have sufficient income to meet their needs on the level that they had during the marriage." Based on a "DissoMaster Data Screen," the court found that Leslie's monthly income was $16,768, with net disposable income of $11,623.

The court's statement of decision states that notwithstanding Leslie's condition "there was no evidence that any diminution of income earned by [Leslie] or his business [OGC] was due to [Leslie's] intentional acts." The court also went on to find that

subsequent to the parties' separation, "the income derived from the business has diminished. The Court finds that [Leslie] is not intentionally diminishing the profitability or income that is being derived from the business at this time." The court took note of Robyn's income from her parents' trusts. The court awarded Robyn $2,500 per month in spousal support.

THE MOTIONS FOR SUMMARY JUDGMENT AND THE COURT'S RULING GRANTING THE MOTIONS

The accountant respondents moved for summary judgment on the grounds that there was no evidence that in the absence of their allegedly wrongful conduct, Robyn would have been awarded more spousal support.

The accountants' motion also addressed two other claims propounded by Robyn. These claims were that Robyn was damaged by the accountants' failure to advise her to file amended tax returns to reflect the hitherto unreported income and that she was forced to sell her residence because of the low level of spousal support. The motion pointed out that, as to the first of these claims, Robyn admitted at the time of her deposition in this action that she had not yet decided whether to file amended returns. The second claim was without merit since Robyn admitted in her deposition that at all times she had sufficient funds to pay the mortgage on the house and that she did in fact make all payments on time.

The lawyers' summary judgment motion also led off with the contention that Robyn could not show that she would have been able to obtain more spousal support in the absence of the lawyers' negligence. This motion went on to address the claim that the lawyers were negligent in not correcting the court when it considered Robyn's income from the parental trusts; the motion pointed out that the trial court was required by section 4320(e) of the Family Code to consider Robyn's separate property as one of the factors in determining spousal support.

Both motions for summary judgment contended that Robyn was barred from recovery by the circumstance that she had unclean hands, the reference being to her alleged failure to disclose to the dissolution court the fact of her prior unreported income.

In ruling on the motions, the trial court found that Robyn could not show that except for the respondents' negligence she would have obtained a better result in the dissolution of the marriage. The court stated that Robyn had not established that she would have obtained a better result and that she "cannot establish it." The court went on to note that the trial judge in the dissolution proceeding had determined the amount of spousal support "in accordance with California law." The implication here is that the decision on spousal support was the product of the court's application of pertinent legal principles and not the result of anything the lawyers and accountants did or failed to do.

The court went on to note that Robyn had not shown that she had sustained any damages as a result of respondents' alleged failure to advise her to file an amended return and she had also failed to show that she was forced to sell the residence because of inadequate spousal support.

Finally, the court found that Robyn's "failure to disclose unreported income to Judge Denner [in the dissolution proceedings] is a bar to recovery here."

DISCUSSION

1. Introduction

Robyn propounds four theories on which she claims she can recover against respondents.

One. She would have obtained substantially more spousal support but for respondents' negligence. Two. She sustained damages as a result of respondents' failure to advise her to amend her income tax returns. Three. As a result of respondents' failure to advise her that she could receive less than $9,100 in spousal support, she ended up paying more capital gains taxes on the sale of the Strawberry Drive house than she would have paid as a married woman. Four. She is not barred from recovery by the unclean hand doctrine.[3] Robyn contends that there are triable issues of fact as to each of these four theories. We examine these theories and conclude that Robyn is unable to support

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[3] Strictly speaking, this is not a theory of recovery but rather a contention that she is not barred from recovery by this doctrine.

the first three with any evidence. As to the unclean hands defense, we conclude that it does not apply.

2. Spousal Support

Robyn's most substantial claim against the attorney respondents is that respondent Glucksman admits he did not investigate Leslie's work patterns and that he did not call Phil and Gregg Legus to testify.

While on their face these contentions have a degree of plausibility, Robyn has been unable to identify any fact or facts that the investigation would have revealed that would have favored her. The same is true of the testimony of Gregg and Phil Legus; Robyn made no proffer below or to us as to what favorable testimony these witnesses would have offered had they been called at trial.

It is true that on a motion for summary judgment, all inferences are to be drawn in favor of the party opposing the motion. (*Rubio v. Swiridoff* (1985) 165 Cal.App.3d 400, 403.) "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600, subd. (b).) There are, however, literally no facts from which we could infer that the pretrial investigation, or the Legus witnesses, would have produced evidence favorable to Robyn. The fact that the Legus witnesses had worked for or with Leslie in the past is entirely neutral. Unfortunately for Robyn, there is not even a hint what their opinions would have been about Leslie's work habits.

In propounding the theory that the attorney respondents were negligent in their preparation of their case, Robyn was required to point at least to *some* favorable fact or facts that would have been unearthed if her attorneys had been diligent. She did not do so. This leaves aside the further point that it is really not enough for such evidence to have been favorable. She had to make some showing that this evidence would have made a difference in the amount of spousal support awarded. Needless to say, there is nothing in the record that suggests that the (unidentified) missing evidence would have made a difference.

The fact of the matter is that the sole issue that Judge Denner decided was whether the "historic" stipulated earnings of $31,264 or then-current earnings should be the basis of spousal support. This issue was litigated upon the basis of Robyn's and Leslie's conflicting testimony, as well as accountant Sweeney's testimony. Robyn clearly faced serious obstacles in trying to show that a different, better result would have come about but for her attorney's negligence. The one sure way to do that was to produce evidence that her attorney failed to present before Judge Denner, or at least produce a fact or facts from which this could be inferred. This she has failed to do.

Robyn's complaint about accountant Sweeney's testimony falls in the same league as her contention about the Legus witnesses. She is unable to point to any evidence that another, purportedly nonnegligent accountant would have produced.

Robyn also claims that she was inadequately advised about her chances to receive substantially less than $9,000 in spousal support. This complaint makes sense only if Robyn can show that she would have accepted one of the settlement offers, rather than taken a chance on a contested hearing before Judge Denner. But Robyn did not state in her deposition that she would have accepted either of the settlement offers that were made. In fact, in her declaration submitted in opposition to the summary judgment motions, she stated she was not told about the first offer but not even here did she state that she would have accepted it, or even considered it. Thus, while she claims that the attorney respondents were negligent in not conveying the first of these offers to her, she cannot explain why this made any difference.

Robyn claims that she rejected the second settlement offer because respondent Glucksman assured her that the accountant respondents' work was excellent; she claims that she was never told that she could wind up with "substantially less" spousal support than $9,106, which was the amount the accountant respondents projected. But Robyn admitted that respondents did not guaranty that she would receive a certain amount of spousal support. Given this admission, one is left with an outcome on spousal support that was disappointing. That a hearing produced a disappointing result for one of the parties does not mean that that party's lawyer committed malpractice.

It is true that the dramatic drop in Leslie's earnings, coming at the time of the separation, is striking. It is also true that the attorney respondents appeared to have been rather confident that they would obtain around $9,000 in spousal support. While the interplay between these phenomena gives food for thought, a case cannot be based on vague suspicions. Facts are required, even if they are contested, and that is what is lacking here.

3. Amendment of the Income Tax Returns

Here we address only the claim that respondents' failure to advise Robyn to file tax returns that showed the previously unreported income caused Judge Denner to award less spousal support that he otherwise would have. We defer discussing Robyn's and respondents' ethical claims about the unreported income to the part on the unclean hands defense.

The premise of Robyn's contention is that Leslie's "historic" earnings that were reported to the dissolution court did not reflect the unreported income. This is not correct. The unreported income was included in the "historic" earnings under the label "agreed upon adjustment." It is to be kept in mind that the prehearing stipulation stated that, prior to 2004, Leslie's earnings were $31,264 per month. It is this sum that shrank to half that much after the separation.

Robyn does not claim that the stipulated $31,264 was incorrect. It appears that Judge Denner was correctly informed of Leslie's preseparation earnings.

4. Capital Gains on the Strawberry Drive House

Robyn states in her opening brief that she is *not* complaining about having had to pay capital gains taxes when she sold the Strawberry Drive house. She states that her claim is that she "lost the house due to bad advice on spousal support and had to pay enhanced capital gains taxes by herself rather than as a married woman."

The allegedly bad advice about spousal support was that she was not advised that there was a chance that she would get significantly less than $9,100 in spousal support. This claim founders on Robyn's admission that respondents did not guaranty that she

would receive a certain amount of spousal support. In other words, respondents did not purport to guaranty that she would receive $9,100 in support.

Once this fact is admitted, the issue is reduced to a case of disappointed expectations. But, as already noted, disappointed expectations do not convert, without more, into legal or accounting malpractice.

It is also true that Robyn's only alternative to going through with the hearing before Judge Denner was to accept the settlement offer extended on the day of trial. That offer was, after two years, a payment of $3,000 per month, only $500 more than the spousal support awarded. According to Robyn's own figure, the house required $10,000 per month. Thus, the best offer she had, i.e., $3000, fell far short of what she needed. This means that she would have had to sell the house if she accepted the settlement offer. The best course of action was therefore to take her chances with the contested hearing. This means that the best advice she could have been given was the advice she got, which was to reject the settlement offer and do her best in the hearing before Judge Denner.

5. The Remainder of Robyn's Contentions

Robyn contends that, in the event we find that she has no facts to support her claims, we should remand with directions to give her "an opportunity to obtain that evidence."

Robyn did not request a continuance in the trial court for the purpose of securing additional evidence, as she had a right to do under subdivision (h) of Code of Civil Procedure section 437c.[4] Any such motion would have had to show: (1) the facts to be obtained were essential to opposing the motion; (2) there was reason to believe such facts

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[4] "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due." (Code Civ. Proc., § 437c, subd. (h).)

may exist; and (3) the reasons why additional time was needed to obtain these facts. (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633.)

We cannot comply with Robyn's request as it is patent that a motion for a continuance to obtain additional evidence must be made before the trial court rules on the summary judgment motion. (See fn. 3, *ante*.) It is certainly far too late to make such a request when the judgment is on appeal. Moreover, Robyn's belated request, even if we could entertain it, simply does not comply with the requirements of such a motion set forth in the *Frazee v. Seely* decision.

Robyn states that by leaving the tax problems posed by the unreported income unresolved at trial, she has been "left . . . vulnerable to being forced to pay the entire amount." We question the premise that Robyn is exposed to having to pay the entire tax delinquency. In any event, there is nothing that indicates that the delinquency has even been reported. The last indication in the evidence about this is that Robyn has been advised to report it but has not yet done so. This is, again, a failure on Robyn's part to produce facts that support this claim. A claim of being "vulnerable" in the abstract is simply too speculative.

Finally, Robyn advances for the first time on appeal the claim that respondents were her fiduciaries and that they breached these obligations. A plaintiff may not raise a new theory of recovery on appeal when the theory was not alleged in the complaint. (*Lockhart v. County of Los Angeles* (2007) 155 Cal.App.4th 289, 311.)

6. The Unclean Hands Defense

The trial court ruled that Robyn's action is barred by the doctrine of unclean hands. This ruling is incorrect for two reasons.

"A person is not placed forever entirely outside the protection of the law in a particular transaction, because, forsooth, some time in the distant past he was guilty of an improper act." (*Nealis v. Carlson* (1950) 98 Cal.App.2d 65, 69; see generally 13 Witkin, Summary of Cal. law (10th ed. 2005) Equity, § 12, pp. 296-297.) By the time Robyn filed her malpractice action against respondents, the failure to report income prior to 2004 was not only well in the past and a long-accomplished fact, it had no bearing on her

malpractice action. That is, she was not suing respondents because they had advised her not to report her income. In part, she was suing them because they had not dealt with this fait accompli as they should have.

The attorney respondents claim that their unclean hands defense is "based entirely upon [Robyn's] calculated decision" not to report a part of the community income. We do not agree. Robyn's decision, made prior to 2004, not to report income is not a part of her case against respondents. It was simply a fact with which respondents had to deal. That Robyn brought with her an uncomfortable fact is surely not an exceptional circumstance when it comes to the practice of the legal and accounting professions.

The second reason that this defense is not available to respondents is that applying this defense to bar Robyn's claim requires the resolution of contested issues of fact. Robyn states that she informed respondents of the fact of prior unreported income and respondents did nothing to assist her, i.e., they ignored the matter. Respondents, on the other hand, claim that they advised Robyn to amend her income tax returns but she refused to do so. Respondents' further claim is that Robyn, like Leslie, actually instructed them to conceal the fact of unreported income from the dissolution court. It is only the latter claim that provides a colorable basis for the application of the unclean hands doctrine. It is obvious, however, that this requires the rejection of Robyn's version and the acceptance of respondents' rendition of the facts. This cannot be done within the framework of a motion for summary judgment.

We therefore disapprove of the trial court's ruling that Robyn's action is barred by the doctrine of unclean hands.

7. Costs on Appeal

There is reported precedent in an appeal from an award of spousal support to award costs to the appellant even though the judgment is affirmed. (*Stuckey v. Stuckey* (1964) 231 Cal.App.2d 382, 387.) This of course is not such an appeal but the cited case underlines the ambit of an appellate court's discretion in the award of costs on appeal. We have disapproved the trial court's finding that Robyn is chargeable with unclean hands. This means that Robyn has succeeded to some extent, however limited and

symbolic that success may be. We, therefore, conclude that costs on appeal should not be awarded to either party.

DISPOSITION

The judgment is affirmed. For the reasons set forth in part 7, *ante*, the parties are to bear their own costs on appeal.

FLIER, J.

We concur:

RUBIN, Acting P. J.

BENDIX, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.